THE CASE

BETWEEN

Sir *Jerom Alexander* Knight, second Justice of His Majesties Court of Common Pleas in *Ireland*: And Sir *William Ashton* Knight, second Justice of His Majesties Court of Kings Bench in *Ireland*.

06-74

CONCERNING

PRECEDENCY.

THE CASE, as Sir William Ashton puts it, is, viz.

Sir William Ashton hath a Letter from his Majesty to the Lords Justices of Ireland to pass Letters Patents under the great Seal, to make him second Justice of the Kings Bench there. Dated the 3 Novem. 1660. *Letter dated 3. Novemb. 1660.*

Sir Jerom Alexander hath a like Letter to make him second Justice of the Court of Common Pleas in Ireland. Dated 30 Novemb. 1660. *Letter dated 30. Novemb. 1660.*

Several Letters Pattents pass to each accordingly, both Dated, the 19 of January 1660.

Both Letters Pattents are presented to the Lord Chancellor, at the same time, both being in place. *Both Letters Patents dated 30. Jan. 1660.*

Sir Jerom Alexander demands Precedency, and to be first sworn, as Antient to Sir William Ashton in the Inns of Court in England, and an utter Barrester before him.

Sir William Ashton demands Precedency, and to be first sworn, as he was made second Justice of the Court of Kings Bench: as having a Precedency before the Court of Common Pleas, and as his Letter from the King, was of a prior date.

The Lord Chancellor inquires of the Officers of the Courts then attending his Lordship what the practise therein had formerly been, and being informed by them (one of whom was the most eminent Attorney in the Court of Common Pleas) that the Precedency had alwaies been giben formerly to the second Justice of the Kings Bench. Thereupon ordered Sir Willam Ashton to be first sworn with a salvo Jure to Sir Jerom Alexander if any he had. Mr.. Patrick Tallant. N. B. not a member of ye K. Inns untill 1658. under the usurpation — a M. T. in 1640 & 1661.

The first question is to whom the right of Precedency belonged at first: To Sir Jerom Alexander, as antient to Sir William Ashton in the Inns of Court; or to Sir William Ashton, either in respect of being second Justice of the Kings Bench; or as having his Majesties Letter of a Prior date.

The second question is: whether Sir William Ashton being (de facto) first sworn ought not to have the Precedency as Senior Judge, notwithstanding the (Salvo Jure) to Sir Jerom Alexander.

WILLIAM ASHTON.

First, I shall agree it to be the Case in all things, but in this one thing only, which is matter of Fact and resteth in Proof. *The Argument for Precedency by Sir* Jerom Alexander.

And I do affirm, that it was not all the Officers of the Courts there present

 that

that did affirm, that the Precedency had alwaies been formerly given, to the second Justice of the Kings Bench (nor is it so, but the contrary.) But my Lord Chancellor directed Mr. Tallant (who is that Eminent officer of the Court of Common Pleas, mentioned by Sir William Ashton in the draught of his Case) to inquire how the practise had formerly been: And he meeting with one Collonel Knight; inquired of him, who told him so; and upon that single discourse with Collonel Knight, without any conference had with any other of the Officers there present; and without any knowledge that he had thereof himself: Mr. Tallant returns my Lord Chancellor that answer. And thereupon my Lord sweares Sir William Ashton first, with a Salvo Jure to me.

Now albeit this makes nothing for Sir William Ashton in the Case. When I shall make the contrary to appear. Yet I cannot admit of it: because it is not the truth.

And therefore if my Lord Chancellor shall not; upon hearing what we can say for our selves, be pleased to determine the difference, but shall think fit to transmit it for England, I shall humbly desire these words may be left out, and the Case made no otherwise, then as it was: and that Mr. Tallant may be called to declare his testimony to this relation in the Case.

But if in the Course of my Argument, I make the contrary to appear; all that allegation of Sir William Ashtons, will be out of doors: and fall of it self without any more ado.

So I shall proceed to argue the points of his Case. And shall begin to argue his second point first, as most material.

For if the Salvo Jure to me, shall operate nothing, we are at an end. The first point will never come in question.

For if Sir William Ashton being (de facto) first sworn, therefore ought to have the Precedency as Senior Judge: Notwithstanding the Salvo Jure to me. Then the controversie is at an end.

Therefore I shall indeavour in the first place to prove that this (Salvo Jure) doth secure to me my right of Precedency: Notwithstanding that (de facto) Sir William Ashton was first sworn. For this Case is.

And howsoever Sir William Ashton have made this a question in the Case. Yet I presume he is so much a Gentleman, and so conscientious of his words, that if he shall be satisfied, that the right of Precedency did belong to me to be first sworn, as we stood unsworn; that he will not take advantage of his own wrong, and keep that right from me, which he should so gain by a false suggestion.

But I doubt not but to make it clearly to appear.

1 First that the Salvo Jure in the Case, hath secured unto me, what right of Precedency I had to be first sworn, (as we stood unsworn.)

2 Secondly That the right of Precedency to be first sworn did properly belong to me, as we stood unsworn. Notwithstanding his being made second Judge of the Kings Bench: And notwithstanding the Date of his letter.

And first I conceive (that Sir William Ashton will not deny, but that my Lord Chancellor is the proper Judge of this controversie, and so hath power of doing right unto us both. This is so undeniable a truth, as it needs no other proof, but a constant usage and custom as through all England, so throughout all Ireland; whereby in the Common Law. For those customs and usages, which are used and accustomed: Per totam Angliam, & per totam Hiberniam, are the Common Laws of England and Ireland.

Then the usual practise, and course in these Cases have been; That the Lords Chancellors of England and Ireland have constantly, and continually used to swear the Judges to execute their Offices; according to that Duty prescribed by the Statute of 18. E. 3. before they enter upon the execution of their places,

So that, Albeit it be the Letters Patents whereby makes him a Judge; yet without this ceremony of first swearing him to be faithful to his trust, &c. He cannot take upon him the execution of that Office.

The King is Fons Justiciæ; and as Kitchin sayes, at first did justice to his people in his own person. As Moses did, in the time of the old Law, until Jethro advised him, to depute Judges under him for lesser matters, to ease him of so great a burthen.

Thus

See Mr. Tallants testimony under his hand, of the 20 of Decem. 1661. in hæc verba. When the Right Honorable the Lord Chancelor demanded of me who should be first sworn, Sir Jer. Alexander, or Sir William Ashton, I repaired down the stairs to enquire of those whom I conceived better to give an account of that matter then my self. And meeting below the stairs with Coll. William Knight; I put the question unto him. Who answered me, that the second Judge of the Kings Bench was alwaies sworn before the second Judge of the Common Pleas. And thereupon I came up again, and informed his Lordship the same.
Pa. Tallant.

My Lord Chancellor the proper Judge of this controversie.

The Judges Oath settled by the Stat. of 18. E. 3.

The King is Fons Justiciæ. Kitchin.

Thus our Kings of England and Ireland of their Prerogative Royal, have the sole denomination, and appointment of their Judges. Whose Offices being granted to them by Letters Patents under the Great Seal: Yet the Lord Chancellor delivers them to them, and not before they have taken the Oaths of Judges as a Freehold in Fee without livery and seizin, takes no effect. So this Oath is as a Livery and Seizin, to give them possession of their places.

The King have the sole nomination and appointment of his Judges

A freehold in fee without livery & seizin, takes no effect.

The Lord Chancellor may perform this office as he pleases; yet most regularly, 'tis done in that Court, where the party is made a Judge: The Lord Chancellor sitting there in person, and calling the party before him, & advertising him of the Kings favour and pleasure; causes the Letters Patents to be read, then gives him the Oath, then admonisheth him concerning his trust; how he ought to be faithfull in that, and how to carry him self; then sets him in his seate, and there leaves him.

The manner how Judges are usually sworn.

My Lord Chancellor of England is, is the prime Agent in making of Serjeants at Law; out of which the Judges there are still chosen by the King, and there he cannot be a Judge, that is not first a Serjeant. Fortescue. 120.

The Lord Chancellor of England a prime agent in making of Serjeants at Law.

Fortescue some times Lord Chancellor of England, describes the manner of calling of Serjeants in those dales.

The Lord chief Justice of the common Bench, by the counsel and assent of all the rest of the Judges, have used to chose seven or eight of the discreetest persons, that have most profited in the study of the Laws, to be called Serjeants, presenting their names unto the Lord Chancellor in writing; who by vertue of the Kings writ, which he sueth, he chargeth every of the persons elect, to be before the King, at a day by him assigned, to take upon him the state and degree of a Serjeant, under a penalty in the Writ mentioned; at which day the Lord Chancellor sweareth them, or and so inuests them in their degrees of Serjeants. And afterwards they are presented at the Common Bench bar unto the Judges, in their party coloured robes. Where they are admitted to plead; and none but Serjeants.

Fortescue de laudibus legum Angliæ 117.

The manner of calling of Serjeants at Law.

Fortescue supra. 120. Brook. par. R. 84

Thus the Lord Chancellor hath the sole power by antient usage and custom; which is the Law of the land investing every Serjeant, and every Judge in taking their degrees and places. According to their seniorities, as they are in their degrees one before another.

The Lord Chancellors have the power of order in these cases.

Neither in any Country in the world, is there any special degree given in the Laws of the same lands; but only in the Realms of England.

Fortescue 120.

No degrees given in the law of the same land but in England.

Then my Lord Chancellor having made this saving in the Case, to preserve my right of Precedency. I shall in the next place indeavour to prove that it is lawfull, and of force to preserve it to me.

A Saving what it is.

A Saving, is the preserving of a right from being lost; by an act, which otherwise would destroy it.

Several kinds of rights. Cook. 1. Instit. 345.

And therefore Savings, are most frequent in Acts of Parliament, to preserve mens rights, that they be not lost; which to pass without a Saving were otherwise extinguished.

Now there are several kinds of Right,

	As.
1 Jus, recuperandi.	4 Jus retinendi.
2 Jus, intrandi.	5 Jus percipiendi.
3 Jus habendi.	6 Jus possidendi.

So that this word Right, is of a large extent, and in a (Saving) doth include every one of these Rights, and more.

Plow. Com. 487. b. 488. a.

And as it is said in that Case, that it stands with reason and justice; that that Right should alwaies be preserved to him, to whom it doth belong. And therefore this word (Saving) saith Plowden, extendeth to preserve unto a man, whatsoever that is his. It is a general word, and shall in the Saving be extended to that thing which a man pretends right unto; or in which he hath an estate.

Thus in Fines, the right of the Land includeth, and passeth the Rate of the Land. As. S cognovit tenementum Pred. esse (Jus ipsius B.)

Cooks Instit. 1. 345. esse jus.

And so in the Statute of West. 2. ca. 3. The Statute saith defendere Jus suum; which is Seisinam suam.

Stat. West. 2. 3. jus summum.

Then the Case of my Lord Dyer, concerning the Deanary of the Cathedral Church of Wells, which was first surrendred, and afterwards extinct by Act

Dyer. 10. Eliz. 273.

Pophams Rep. 16.

The Town of *Gloster* made a County with a Saving, that the Justices &c. may sit there.

My own Case in Lincolns Inn.

Lincolns Inn ad concilium ibid tent. 11. die Febr. An. R. Jac. &c. 20.

Upon reading a certificate that Jerom Alexander *Gent. was admitted in the Society of* Furnivals Inn, *the first day of* July, 1609. *and during his abode, demeaned himself well, and performed exercises of learning; and being now a fellow of this house, was at this Councel called to the Barr. Albeit he was not seven years compleat of this Society. Saving to all his Antients their Antiquity; and is to be published in* Easter Term *next. He first paying all duties to the house and chappel.* Ro. Ayre. C. N. L.

The first question. The second in order to be debated,

Of the Inns of Court, and Inns of Chancery in England.

Four Inns of Court, eight Inns of Chancery in England.

Parliament (Saving) to all strangers, their rights, &c. and this adjudged a preserving of all the rights of strangers, whatsoever, that had any estates made them by the Deane or Chapter before.

Then in Pophams Reports, there is a Case to this effect, viz.

That King R. 3. by his Letters Patents, doth grant to the Burgesses of Gloster, and unto their successors, that the Town of Gloster shall be a County of it self; several and distinct, from the County of Gloster (Saving to the King his Heirs and Successors; that the Justices of Assize and Gaol Delibery; and Justices of the Peace of the said County, may at all times enter into the said Town, and hold and kep the Assizes and Sessions there, for the said county. And it was adjudged by all the Justices, that this was a good saving; whereby the Judges of Assizes, and Justices of the Peace, might enter into the Town, and kep the Assizes and Sessions there, for the County at large.

For as the King by his Letters Patents may make a County, and except this from any County; so in the making of it, he may except, and save to himself, what part of the jurisdiction and privilege thereof he pleaseth.

And I shall conclude this point with a case of mine own.

Sir. Justice Brown, now one of the Judges of the common Bench in England, and my self, being both admitted of the house of Lincolns Inn, upon one day, and at one time; yet because I had been a student three or four years in Furnivals Inn before; had the favour of the house to be called to the Barr one year before him, so by taking of that degree; should have been his Antient, and taken Precedency before him. Albeit re vera, he were my Antient in the house before. But in the order of my call, there is a (Saving) to all my Antients their antiquity; and by this saving I lost my Precedency to him: and upon this only reason; that the Barrester which presented him to the Bench, at the same time, was antient to the Barrester that presented me; and yet both presented together at one instant of time.

This is directly in the point. So as that by a saving I once lost my Precedency; so now I hope by a saving to preserve my right of Precedency; it being my due, and just to have it.

Then as to Sir William Ashtons second question. Whether the right of Precedency belonged at first to me, as antient to Sir William in the Inns of Court. Or to Sir William Ashton, either in being second Justice of the Kings Bench; or as having his Majesties Letter of a prior date.

And I shall clearly prove that the right of Precedency, did clearly belong to me at first.

1. Notwithstanding that Sir William Ashton was made second Justice of the Kings Bench.

2 And notwithstanding that his Letter is of a prior date.

Then first, We must look to the rock from whence we are hewen; to the Inns of Court in England, and see what is usually in such Cases done there; and then consider what is to be done, and is usually done here in Ireland, in a Case of this nature.

Then in England, we know there are four Inns of Court, and eight Inns of Chancery; two Inns of Chancery appropriate to every Inns of Court. Where that all those that profess the Law (under the degrees of Serjeants; for they have two Inns belonging to themselves apart, where the Judges and Serjeants do only lodge) but all, aswel those in places Judicial as Ministerial, have their breedings there at first.

And antiently, every one that intended the practise of the Law, was first admitted of one of the Inns of Chancery; and began his studies there, where by converse with Officers, Attourneys, and Clerks belonging to the Courts of Law, they gained much knowledge and experience, in the practique part of the Law, which made their studies much more easie, and made them much the better to understand the Theory of it, in their books, and fitted them much the better for the practise of it afterwards.

Nor was it time lost to study there; not only for the reasons aforesaid. but of great benefit and advantage also. For that every Inns of Court, having two of the Inns of Chancery appropriate to it, they usually sent them Readers from amongst them

themselves Barresters at Law to read the law to them, in those Inns; before whom they performed exercises of learning, argued the readers case at the barr in in the house. And then every Inns of Court also sent two Students, of the most antient, under the barr; viz to argue likewise the readers case, there in the said Inns of chancery. And in this way, antiently were all our famous Judges of England bred; and whose judgments we now reverence, as Presidents viz imitation. And then, when after they came from thence to the Inns of court; they had some of that time allowed them which they had spent in the Inns of chancery, in their studies viz promotion unto the Barr.

Every Judge was first a student of some one of the Inns of Court. then a Barrester, then a Bencher, then a Reader, then a Serjeant at Law, then a Judge.

Then every Judge in England, was first a student in some one of the four Inns of Court, and after seven years study, was by the Benchers, who are the Gobernours of those houses; called to the Barr, and admitted to practise as a counceloz at Law; then was a Bencher, then a Reader, then a Serjeant, then a Judge.

Carys Case in Noys Rep. 107.

And in England, no man can be admitted viz to practise as a Lawyer, before he hath been called to the Barr. Viz in Noy's Reports, in Carys case: it is there delivered viz Law, that by the course of the common Law, a man may not give council oz addice, until he hath bin called to the barr; no, though he hath Letters patents, enabling him to do so, as fully as if he had bin called to the Barr.

The Inns of Court no bodyes politique.

And though the Inns of court be no Bodyes Politique, incozporate by letters patents to plead, and be impleaded by any name; yet by the common law of England, which are the common customs of the land; they have gained such a power to themselves, that within their several societies, they have the power of an ozder and Gobernment, to promote the noble study of the law, in the best way they shall think fit.

The study of the Law a noble study.

The study of the Law qualifies men for other imployments both at home and abroad though they make it not their profession.

And therefore the more noble; because almost all the Nobility and Gentry of the land, viz the most part have their education there; as it were an University oz school of all commendable qualities, requisite viz Noblemen and Gentlemen; where those that will not make it their profession, yet do exercise themselves, in all kind of other studies, and pastimes, which are fit viz Noblemen and Gentlemen to recreate themselves withal.

They have degrees given in it. And in no other Country in the world for the Laws of the land.

And therefore, viz the endowment of virtue; Noblemen and Gentlemen will place their children in those Inns of court; though they desire not to have them practise the law, but viz the better qualifying of them, viz other imployments, both at home and abroad.

The Seniority goes according to the admittance both in the house and abroad.

They have degrees given them also, as in the Universities; and not degrees only, but also a state no less solemn, then theirs.

And as in the Universities, he that is first matriculated, and so received into the fellowship of the University, hath the Precedency of all that came after him. So it is in the Inns of court. All Students take their places according to their admittances into those societies, whereof they are made members: Which is done by the several Benchers of those houses, to whom they are presented.

And as this admittance, and the receiving thereof, gives us Precedency in the house, as all meetings and exercises within the house, so it doth abroad. As at all readings in the Inns of chancery, whether they from every of the four houses are sent to argue the Readers case: There every man takes his seniority, according as he hath bin admitted, in any of the Inns of court without distinction.

The degree of the bar gives seniority to all that slip their time.

And when they take their Degree of the Barr, still they continue their seniorities; unless it happens (as often it doth) that some do slip their time, and do not take their degree till afterwards, and then he looses his antiquity to all that have taken their degrees before him; viz the Degrees gives the seniority.

The same rule is holden as to calling to the Bench.

The same rule is holden, as concerning those that are called to the Bench. He that is first called, hath his seniority accordingly. The same order is observed concerning the call of Serjeants, all are sworn according to their Seniorities.

The same rule is concerning Serjeants at Law, when called. The manner shewed herein before. Fortescue 120.

And as a Barrester at Law, cannot regularly be called, till he be seven years standing a student: so no man can be made a Serjeant at Law, till he be sixten

years a ſtudent in ſome one of the ſaid four Inns of Court, and a Barriſter, and hath been a reader in the houſe whereof he hath been a member.

To be a double reader, how ment.

Some will have it, that he muſt be double Reader, before he be made Serjeant. But that may be ment of reading in the Inns of Chancery, and then in the Inns of court, as commonly all ſo heretofore that were made Serjeants; and yet that is no certain rule. For now Serjeants are commonly called that have but read in the Inns of court alone; ſome have been called that have not read at all, as Sir Thomas Heatley, who was made puiſne, to all that call of Serjeants, though he were ſenior to many of them that were called with him, which proves that reading in an Inns of court is neceſſary to precede the calling and degree of a Serjeant at law. Some call them Serjeants of the Miuoſe. And that proceeds from this: You may obſerve them to bear a white Miuoſe of ſilk; it ſhould be in token or ſign, that all are thus graduate, which is the principal and chief inſignment of habite with which Serjeants at law, in their creation are decked; and neither the Juſtice, nor yet the Serjeant ſhall ever put off the Miuoſe no not in the Kings preſence, though he be in talk with him.

2 Par. Crook. Rep. 671.

Fortescue de laudibus legum Angliæ 120. and 121.

Fortescue ibid.

What a Judge is.

But a Judge is no degree in the Law, ſaith Forteſcue; but an office only, and a room of authority, for to continue during the Kings pleaſure. And in England he cannot be a Judge, unleſs he be made a Serjeant at Law firſt.

Order and precedency amongſt the Judges.

And we ſhall find order and Precedency amongſt them alſo: both in England and Ireland.

The Lord chief Juſtice of the Kings Bench, takes his place before the Lord chief Juſtice of the Common Bench; and the Lord chief Juſtice of the Common Bench, before the Lord chief Barron; and the Lord chief Barron before all the puiſne Judges of every the Courts of Law; and then the puiſne Judges of all the Courts, one before another, as they are ſworn one before another.

See 2 par. Crooks R. 170 par. 24.

Sir Thomas Foſter Serjeant, was ſworn a Juſtice of the common Bench. And Sir Edward Heron being an antienter Serjeant then he, was ſworn one of the Barrons of the Exchequer; and becauſe Serjeant Heron was ſworn after the other, and though both in one day, yet he loſt his antiquity to Foſter, for that reaſon only.

Judge Fosters caſe. Swearing firſt gives the Seniority.

See Crooks 2. Rep. 197.

No Saving no Precedency.

But there was neither any demand of Precedency, nor any ſuing in that Caſe, as in this caſe of mine; for I did all things in order to preſerve my right And am therefore confident, I ſhall not looſe it.

Sir George Crooks own Caſe in his 1. Rep. 127.

The next is, Sir George Crooks own caſe; who in Michaelmas Term 4. Caroli. Being then a Judge in the Court of common Pleas, was removed into the court of Kings Bench; and before his removal, Juſtice Yelverton, then a fellow Judge with him in the ſame Court. And Sir Thomas Trevor and Vernon, being then Barrons of the Exchequer, were his puiſnes; who pretended, that by his removal, and his taking the Oath de novo in the Kings Bench, he had loſt his Precedency to them, and therefore claimed the place of him. But it was ruled by all the Judges for Sir George Crook: but upon this reaſon, that although he were new ſworn, yet he never ceaſed to be a Judge. And therefore his ſwearing de novo in another Court, did not looſe him his Precedency which he had before.

Firſt, By all which it doth appear, that all ſtudents of any of the Inns of Court in England, have Precedency one before another, as they are admitted in time one before another.

And ſecondly, That all Barriſters, Benchers, and Serjeants at Law, have Precedency one before another; as they are called to thoſe degrees one before another.

Thirdly, That all puiſne Judges take their Precedencies, as they are ſworn one before another.

Fourthly, That all Barriſters, Benchers, Serjeants and Judges, when more come at one time to be ſworn together, every is ſworn according to his Seniority which he hath before others at the time of his ſwearing.

His Majeſties Letter of a prior date doth give Sir William Aſhton no right of Precedency before me at all.

The next thing that is conſiderable in this Caſe is, what his Majeſties Letter of a prior date doth operate to give to Sir William Aſhton precedency before me.

His Majeſties Letter imports no more, but his Majeſties pleaſure thereby ſig-

nified

rified, and direction given to make him a Judge: So is only an act of choise, and of no more effect, then if his Majestie should have declared his pleasure, at several times in one day, to make several Judges of his several Courts. This doth confer nothing upon the person de facto; but is it a matter in fieri, to be done, for notwithstanding that, they are not Judges, till they are made so upon record, by his Majesties Letters Patents under his great Seal, which is a record; and then the Lord Chancellor his swearing them to perform that duty and office, with which the King have intrusted them; to the Kings pleasure first signified, makes nothing at all for to make a man a Judge, nor doth it add any force or strength unto Sir William Ashtons demand.

Crooks 2. par. R. 1.

For this purpose; the Case in Crooks second Reports, doth put it to be so, and is a stronger Case, then this of Sir William Ashtons.

Where eleven Serjeants were called by Writ, in the life time of Queen Elizabeth, and before the return of the Writ, the Queen dyes, and King James succeeds; and afterwards new Writs do issue, to call them in the reign of King James, returnable at a day certain; and afterwards other Writs issue of a later teste. To call three more, viz. Snigg, Shurley, and Hutton, returnable at the same time with the other eleven; all come to the War together to take their Oaths, according to their Seniorities; notwithstanding the several testes of their Writs one before another.

The Letters gives nothing of Precedency, in respect of the date one before another for the teste of a Serjeants Writ one before another gives no right of Precedency in taking the degree.

And Sir John Crook, whom I knew afterwards a Judge in the Kings Bench, being one of that call, who having formerly been Speaker in the house of Commons in Parliament: And therefore had Precedency before all Counsellors at the Bar; and would therefore have been Senior, of all that call of Serjeants, which was much laboured for him at Court; yet being puisne to five of them, was sworn after them, according to his seniority.

Whereby it appears, that it was not the prior Teste of the Writs, nor his priviledge of having been Speaker of the house of Commons, that gained any thing of priority one before another. But their seniorities one before another, as they stood unsworn; which settles them in their Precedency one before another; as they stood in their degrees one before another. And this is a stronger case then Sir William Ashtons: In as much as a Writ which is an essential part of the call, is more towards the degree, then his Majesties pleasure barely signified by his Letters.

Objection, that albeit it may be so in England, yet not in Ireland.

But then it may be objected; that albeit this may be granted to be the order and rule in England; yet it is not so in Ireland. For here are no Inns of Court, here are no degrees taken of Barresters, Benchers and Serjeants at Law; Nor are the Judges here made from amongst that order of Serjeants at Law; but of such whom the King pleaseth to nominate, and appoint for that service. And then Sir William Ashton being appointed first to be a Judge of the Kings Bench, ought to take place of me; as declared after him to be a Judge in the Common Bench.

The same common Law that governs England *also* Ireland *is governed by it.*

That the Common Law of England is the same Common Law by which Ireland is also governed: Introduced by King John in the twelfth year of his reign. Although the conquest of Ireland, was made before, by King Henry the second, in the eighteen year of his reign, who was father to King John. And placed many Britains here; and granted the City of Dublin, to the men of Bristol, to inhabite, and then returned into England; and afterwards, in the twenty third year of his reign, by Parliament be constituted his sonne John (who was afterwards King of England) to be King of Ireland, and granted to him and his heirs, the whole Kingdome. And in the twenty first year of his reign, he sent King John into Ireland, with a great train of young gallants. He being then but twelve years of age; who used the Irish with such disdain, and derision, that the Irish took occasion thereat to revolt from him and his government, so that he shortly after returned back into England; without doing any remarkable thing. But notwithstanding his creation to be King; yet during the life of H. 2. & R. 1. he was stiled in his several Charters, by the name of Dominus Hiberniæ, (and not King) until after the death of King R. 1. As appears by several Charters by him, granted to the City of Dublin; in the first whereof being without date. He is stiled, Johannes filius domini Regis Angliæ, & dominus Hiberniæ. And in the second,

King H. 2. 18.

Cooks instit. 141. 7. R. 22. in Calvins case, Rott. Parl. 11. H. 3. memb. 3.

bearing date at London the 15. of May; in the yeat of the reign of King R. 1. He is stiled Johannes dominus Hiberniæ comes Mortoniæ. And in a third Charter, granted to the City of Dublin, bearing date at Upton the 7. of February in the 2. yeat of his reign. He is stiled, Johannes dei gratia Rex Angliæ, dominus Hiberniæ, dux Normandiæ, & Aquintaniæ, comes Andegaviæ.

Then afterwards, in the twelfth yeat of his reign, he came again into Ireland, and brought along with him many learned men in the Law, and other Officers and Ministers of all sorts; and established the form of Civil Government, to be according to the Laws of England.

So that he not only introduced the Law; but we may conceive, settled Judges (which in the History goes by the names of learned men.) And ministerial Officers of all sorts, in the Courts of Law; such as are in England. Which forms of Government, have ever since continued in this Kingdome to this day.

The common law being the same, the same rules of making Judges and officers in the courts of Law must be the same.

This being thus; it follows; that the same Rules and Orders of proceeding, in making Judges and other Officers; and proceedings in the Courts of Law should be the same, as well in Ireland, as in England.

And we see, and know by experience and common practise: That all the Courts of Law; and the Officers, are the like in name and power: And all of them have, and take the same Places, and Precedences, one before another; here, as there. The antient usages and customs of the land, is the common law of the land; as 'tis said in Combes case, in Cooks 9. R. That which is used, per totam Angliam, is the common law. For the custom of the land, is the law of the land. Therefore in my Lord Dyer, where 'tis said, quod habetur talis consuetudo inter juratores per totam Angliam, &c. This is said to be the common law. And so all these customs and usages of making Barristers, Benchers, Serjeants, and Judges; and their taking of their Precedencies one before another, as is aforesaid. This Lex terræ, is the common law of the land. And is a matter of civil right and order; neither against Justice, nor the Common Wealth; nor is it to the prejudice of any man, and therefore reasonable; and to prevent disorder and confusion, and therefore necessary and convenient. And then, Consuetudo, ex rationabili causa usitata. And so full.

Combes *Case* 9. R. 75. b.
What the common law of England *and* Ireland *is.* 34. H. 8. Brooks Cases foll. 57. P. 225. 22. H. 6. 21. 34. H. 8. Dyer 54.

And if we shall well weigh, and consult the statute of 33. H. 8. 3. here in Ireland. We shall find that it was the judgment of that Parliament, that it should be so, which is but a declaration of the common law before. For that statute sayes. And provides thus. viz.

Stat. 33. H. 8. 3.

The Proviso.

Provided allwayes, and be it Enacted by Authority aforesaid, that no person, or persons, that now is, or hereafter shal be within this Realm; except the Party, Plaintiffe, or Demandant, Tenant or Defendant, shall be admitted, or allowed as a pleader in any of the Kings fower principal Courts, within this His gracious Realme, in any case or matter whatsoever it be; or yet to make or exhibite, to or in any of the said fower Courts, any declaration or bills, plea in barr, replication, or rejoynder; or to give evidence to any Jury, unless it be for the Kings Majesty, or to argue any matter in law; or yet to do, or minister any other thing or things, in any of the said fower Courts, which customarily have been used to be done, by one learned, or taken to be learned in the Kings laws; but such person and persons, as have, or shall be at one time, or several times, by the space of years, compleat at the least demurrant and retiant in one of the Inns of court, within the Realm of England, studying, practising, and indeavouring themselves the best they can, to come to the true knowledge and judgment of the said laws; upon pain of one hundred shillings to every person, or persons offending contrary to the Proviso last before specified, or any thing therein contained.]

Now upon this Statute I do observe.

First, That it was made in a time of Popery. When all Lawyers then were Papists; and had liberty to plead in England and Ireland, And yet it was not thought fit, that any man should practise the law, that had not studied to make himself able for the exercise of the same profession. And therefore the statute calls them, that should be thus admitted to plead, men learned in the laws; and men cannot be learned in the laws, without studying the laws.

Secondly, Because they had no Inns of court in Ireland. Though by the introduction of the common law into England, it is conceived they had the liberty

berty of erecting Inns of court, and Inns of chancery as in England; yet wanting the means to do it; for to avoid barbarisme and nescience, or ignorance in the practise of the Law: They make this statute to compel those that should profess the Law in Ireland, to run the course of their studies in the Inns of Court, first in England; and therefore are in England to be called to the barr before they plead. And this shews likewise that they are two distinct Kingdomes, though governed by the like Laws. And that it was something doubtful before this Law was made; whether a Barrester of England might practise here in Ireland, without leave and licence of the State.

Thirdly, That howsoever this blank— for the years of their studies how many they shall be; happens to be in this statute; yet certainly it cannot be intended a lesser number of years then seven years; which are the number of years that men usually study the Laws in England, before they be called to the Barr; and then all Lawyers were Papists, and yet could not practise the Law as a Councellor, without first being called to the Barr. And then again, the word (compleatly) immediatly following the blank, doth insinuate the same thing: According to the rules and orders of those Inns of Court, where they were to compleat their studies.

And it is but reasonable and just, that a man should spend so many years for to acquire the understanding, and knowledge of so honorable a Science and profession; when as an Apprentice to every trade, and Mechanical occupation, is by the Law tyed to serve seven years, before he can be made free to exercise his trade or occupation.

And Laws are called, Libertates, quia liberos facit, because they make a man free too, though in another sence. And Sir Edward Cook, in the Case upon the statute of 5. Eliz. Concerning Apprentices to be first bound to serve seven years, and then first to be approbed of by the Masters of those companies, under which they serve, before they can be admitted to use their trades. He highly commends this Law, saying; that as this course begets skill in the exercise of trades; so it were prejudicial to the Kingdome, if such should be permitted to use trades, in which they have no skill or understanding.

Cokes 8 R. 129, 130. *in case upon the stat. of 5 Eliz. of Apprentices, cap. 4.* Coke li. 6. 19.

In respect of the dangers, which they themselves run also, and may incur otherwise. For he that will take upon him to use a trade in which he hath no skill, the Law provides him a punishment. as in Fitz Herberts Natura Brev. where an action of the Case was brought against a smith, for pricking of a horse. For men ought to be skilful, before they undertake such faculties.

Fitz. Na. br. 9. imperitia est maxima mechanicorum pœna & quoslibet quærit in qualibet arte peritos. Coke 11. R. 54.

And Scientia, we say non habet inimicum præter ignorantem: Ignorance, is the greatest enemie to science. For these, are like blind men shooting at a Crow, if they kill her, it is by chance: They are like ignes fatui, commonly leading men out of the way; whiles they shine bright in their eyes. The proverb is true in this also. Money makes this man. But as 'tis said of the Nightingale; he is Vox & præterea nihil; a sound and nothing else.

And 'tis against the rule of the common Law, for one tradesman to take up anothers trade, in which he never served.

And 'tis observable also, that Barresters are called Apprentices to the Law; because they serve as Apprentices seven years, before they attain the Barr.

Barresters at Law called Apprentices

And much rather it ought to be so, as the study of the Law is far more difficult, then it can be for a man to learn a mechanical trade and occupation. And how can a blind man judge of colours? It were a foolish presumption, if a lapidary should undertake to state the value and lustre of a Jewel that is lockt up, before he opens the Cabinet.

It is also necessary, that those that study the law, should be first called to the barr, before they be admitted to plead, and make the law their profession; as well for trying of their abilities, as that they take the Oaths of supremacie and allegiance; as all Protestant Lawyers do, to witness their loyalty unto the King, and his Government. For how can the King trust him, to practise the Law under him, in his Courts, to be conversant amongst his Records; to have that opportunity by frequent discourse with his people, to seduce them from their religion and obedience; I say, how can the King trust such men, that will not acknowledge him to be the supream Head and Governour of his Kingdomes, aswell in th

...now ...ames ...y Knight, ...en second Baron of his Majesties

Church, as in the state. And piety is the greatest Policy, of all the rest.

And there is another Statute in Ireland, which if I understand it aright, takes away that objection, or scruple of conscience rather; why they are so nice to take the Oaths of Supremacy and Allegiance, as they are penned in the Statut which commands the taking of them: and which all Protestant Lawyers, I say do take before they be admitted to the Barr.

It is the Statute of 28. of H. 8. ca. 13. here in Ireland; by which it is enacted, and ordained; that all and every ecclesiastical Judge, Ordinary, Chancellor, commissary, Official, Vicar general, and other ecclesiastical Officer and Minister, of what dignity, preheminence, or degree soever they shall be. And all and every temporal Judge, Justice, Mayor, Bailiff, Sheriff, under Sheriff, Escheator, Alderman, Jurate, Constable, Headburrough, Burgholder, and every lay Officer and Minister, to be made, nearer, elected, or admitted within this land; of what estate, order, degree, or condition soever he shall be, from and after the said first day of Novemb. (mentioned in the said Statute) shall before he take upon him the execution of the said Office; make, take, and receive a corporal Oath upon the Evangelists, before such person, or persons, as have, or shall have authority to admit him, that he from thence forth, shall utterly renounce, refuse, relinquish, and forsake, the Bishop of Rome, and his Authority, power, and Jurisdiction; and that he shall never consent, or agree, that the Bishop of Rome shall practise, exercise, or have any manner of authority, jurisdiction or power within this land; but that he shall resist the same; at all times, to the uttermost of his power. And from thenceforth he shall accept, repute, and take, the Kings Majesty to be only supream head in earth, of the Church of England, and of Ireland; and that to his cunning, wit, and uttermost of his power, and without fraud, guile, and other undue means; he shall observe, keep, maintain, and defend the whole effects, and contents of all, and singular Acts and Statutes made, and to be made within this land, in extirpation and extinguishment of the Bishop of Rome, and his authority; and all other Acts and Statutes, made and to be made, in reformation and corroboration of the Kings power, and supream head in earth, of the Church of England and of Ireland; and this he shall do against all manner of persons, of what estate, dignity, degree, or condition they be, and in no wise do attempt, nor to his power suffer to be done or attempted, directly or indirectly, any thing or things, privily or apertly, to the let, hinderance, damage, or derogation thereof; or of any part thereof, by any manner of meanes, or for any manner of pretence. And in case any Oath be made, or hath been made by him, or any person or persons, in maintainance, defence, or favour of the Bishop of Rome, or his Authority, or Jurisdiction or power, he repute the same as vain and annihilate, so help him God and all Saints, and the holy Evangelists.

Stat. 28. H. 8. cap. 13. here in *Ireland.*

Covels *interpreter word* office, *and* Minshaw *upon the word* office.

And the word Office, & Minister do certainly comprehend, and intend all those Irish that now practise the Law. For the word officium, doth signifie the function by virtue whereof a man hath same imployment, in the affairs of another; as the King, or any other common person: and therefore should take this Oath; they at least, that are admitted to practise the Law. And this Act of Parliament was made also in the time of Popery, and by all the Sages of this Kingdome of Ireland, by the Lords Spiritual and Temporal, and Commons of the land all Papists; wherein this question is clearly determined, that the King is supream head of the Church. And why should they more scruple to confess it now, then they did then, when their own Popish Bishops and Clergy, Peers and Commons asserted it. And Acts of Parliament are Established with such gravity, sapience, and universal consent of all the Realme, and for the advancement of the weal publique, that they ought to be maintained and supported. For as Fortescue saies of the Statutes of England, so may we of our Irish Statutes; Quod Hiberniæ Statuta non principis voluntate, sed totius regni assensu condantur, quo populi lesuram illa efficere nequeant, vel non eorum commodum procurare? prudentia enim et sapientia ipsi esse referta putandum est dum non tubæ, aut centum solum consultorum virorum prudentia, sed plus quam Trecentorum electorum hominum, qualem numero olim Senatus Romanorum regebatur editum.

Fortescue 21. cap. 18.

Cok. 10. R. 138. *case of* Chester *Wills*, ad idem

d Ro-

And Acts of Parliament made by King, Lords, and commons of Parliament, are as well of the laws of Ireland; and therefore to be expounded by the

Judges

Judges of the Laws of Ireland; although the Acts concern eccleſiaſtical and ſpiritual juriſdiction.

Then for a cloſe of all; I ſhall make it to appear. That it hath been the conſtant uſage and cuſtom here in Ireland as in England. That the Judges of Ireland as in England, do take their Precedencies one before another, as they are firſt ſworn Judges one before another; and according to the Courſe and manner of England.

And for this. I ſhall cite you a printed Caſe in the point. The Caſe of Tenures upon the commiſſion of defective titles. Some of the Judges now, being Judges then; and can witneſs it viva voce, if need be.

The Caſe was this.

King James by Commiſſion under the great Seal, dated the ſecond day of March in the fourth year of his reign, did authoriſe certain Commiſſioners to grant the Mannour of Dale by Letters Pattents, under the great Seal of Ireland to A. and his heirs; and there is no direction given in the ſaid Commiſſion, touching the Tenure to be reſerved.

There are Letters Pattents by colour of the ſaid Commiſſion, paſſed unto A. and his heirs to hold by Knights ſervice, as of his Majeſties caſtle of Dublin.

The queſtion was, whether the ſaid Letters Pattents be void in the whole, or only as to the tenure.

Which Caſe was argued by the counſel of the Lord Dillon, in the firſt place, which was Mr. Nicholas Plunket, then by Serjeant Catlyn, for the King. And after by John Pollexfen, for the Lord Dillon; and then by Osbaldeſton Attourney General for the King.

And becauſe it was a Caſe of great weight and importance, it was delibered unto the Judges, and they were required by the Lord Deputy and Counſel, to conferre and conſider of it, and to return unto them their reſolution concerning it; but they (upon private conference among themſelves) did not agree in opinion; and therefore it was thought neceſſary for publique ſatisfaction, that it ſhould be argued ſolemnly by them all: And thereupon in Trinity Tearm 1637. the Caſe was argued accordingly. And in that Book is ſet down all the Judges names that argued it, and the order of their Precedency one before another: and as in all Caſes of Arguments by the Judges, the puiſne Judge begins firſt; and ſo it proceeds to the Lord Chief Juſtice of the Kings Bench laſt, and ſo it was done in this Caſe.

Sir William Ryves, that was then puiſne Judge of the Kings Bench. He began and argued firſt. Then Sir James Barry now Lord of Santrey, and Lord chief Juſtice of his Majeſties Court of Kings Bench; but then ſecond Baron of his Majeſties Court of Exchequer; and ſecond Judge to Sir William Ryves; he argued next. Then Hugh Creſſey Eſq; one of the Judges of the Court of chief place, in that place which Sir William Aſhton now enjoyeth: He argued next; and after him; upon another day appointed for the Caſe: Sir Samuel Mayart one of the Judges of the common Pleas, and then ſitting in that place, which I now enjoy, Argued next, then Sir Richard Bolton chief Baron argued next, then Sir Gerard Lowther, chief Juſtice of the common Pleas; and then Sir George Shurley, chief Juſtice of the Court of chief place.

By which the order of Precedency of the Judges in this Kingdome, one before another; doth appear to be the very ſame as in England, according as they are firſt ſworn Judges; and my Predeceſſor being Senior Judge to Sir Williams Aſhtons Predeceſſor had the place of him.

Upon all which matter I conclude.

Firſt, That the right of Precedency belonged unto me at firſt, as we ſtood unſworn; as antient unto Sir William Aſhton in the Inns of Court in England; and that the ſame order is to be obſerved here in Ireland; in aſmuch as by the Stat. of 33. of H. 8. 3. here in Ireland: No man can give advice as a Counſellor at Law, that hath not been firſt admitted of an Inns of Court in England. And the common Law of England and Ireland, which eſtabliſheth the Inns of Court in England, being the ſame.

Secondly, That the Courts of law in England, nor in Ireland, give no Precedency to the Judges at all.

Thirdly,

That the Judges of Ireland, as in England, do take place and precedencie one before another as they are ſworn one before another.

The caſe of tenures upon the commiſſion of defective titles argued by all the Judges of Ireland *and printed 1637. By my Lord chief Juſtice of the Kings Bench in* Ireland *that now is.*

To prove this by teſtimony.

See Baron Dungans *Certificate; heretofore a Judge of the Kings Bench in* Ireland, *which follows in* hac verba.

As the requeſt of Sir *Jerom Alexander* Knight. ſecond Juſtice of his Majeſties Court of common Pleas, I do certifie, That concerning the Precedency of the Judges here in *Ireland*. I know that when *Hugh Creſſey* Eſq. deceaſed, was ſecond Juſtice of his Majeſties Court of Kings Bench in *Ireland*; That Sir *Samuel Mayart* Knight, deceaſed, being then ſecond Juſtice of his Majeſties Court of Common Pleas, took Precedency of him, as being the antienter Judge. And I have often heard, and ſometimes obſerved: that the ſecond and third Judges of the Courts of Juſtice here in *Ireland*, took their Precedency in order, as they were firſt ſworn Judges. And I do know that Sir *James Barry* Knight, then ſecond Baron of his Majeſties

Court of Exchequer; and now Lord Baron of *Santrey*, and Lord Chief Justice of his Majesties Court of chief place,

Thirdly, That Sir William Ashtons Letter of a prior date to mine, gives him no advantage or benefit at all, in the Case.

Fourthly, and lastly, That the saving to me of my right of Precedency, upon the swearing of Sir William Ashton, in the first place hath saved to me my right of Precedency. And therefore I ought to be established in it accordingly.

took Precedency before Sir *William Ryves* Knight, one of the Justices of the Kings Bench: Being sworn second Baron of the Exchequer, before he was made one of the Justices of the Kings Bench. And afterwards when Sir *William Ryves* dyed, and I became of course second Justice of the Kings Bench; Baron *William Hilton* then puisne Baron of his Majesties Court of Exchequer, claymed Precedency before me, as senior Judge; and at that time some of the Judges inclined to his Precedency, as he was a Senior Judge. All which I shall be ready to testifie upon occasion.

Dated at my Chamber in the Inns this 3. day of *January* 1661.

Thomas Dongan

Jerom Alexander.